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84-2024

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SAMUEL C. SNAER,
Petitioner,

VS.

THE PEOPLE OF THE TERRITORY OF GUAM,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Samuel C. Snaer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this cause on April 25, 1985.

QUESTIONS PRESENTED

The Ninth Circuit admits that the right to consult with an attorney *before* questioning is significant, because counsel can advise the client whether to exercise his right to remain completely silent, or if the chooses to speak, which questions to answer or how to answer them, but it holds that Petitioner was properly informed of his *Miranda* rights, although *not explicitly*. The question presented for review is whether the *Miranda* warnings which inform a suspect of his right to consult a lawyer *before* questioning are required to be *explicit*.

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OPINIONS BELOW

No opinion was rendered by the Superior Court of Guam. The opinion of the Appeilate Division of the District Court of Guam is unreported. The opinion of the Ninth Circuit is reported in 758 F.2d at 1341. Of course copies of both the unreported and reported opinions are appended hereto.

JURISDICTION

The judgment of the Ninth Circuit was entered on April 25, 1985. A timely petition for rehearing was denied on June 7, 1985. The statutory provision which confers on this Court jurisdiction to review the judgment of the Ninth Circuit is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual services in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

48 U.S.C. § 1421(u)

(u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States; article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency.

THE CASE

The facts material to a consideration of the question presented for review were set forth by the Ninth Circuit as follows:

[Petitioner], Samuel C. Snaer, was convicted in the Superior Court of Guam of aggravated assault and possession and use of a deadly weapon during the commission of a felony. . . .

Prior to trial, Snaer unsuccessfully sought to suppress written statements he had made to police and to dismiss the deadly weapon charge. At trial, Snaer's statements were admitted into evidence over timely objection. Snaer's convictions were affirmed by the Appellate Division of the District Court of Guam. [The statutory provision which conferred on the district court jurisdiction to review the judgment of the superior court is 28 U.S.C. § 1424(a).] Snaer [then appealed pursuant to 28 U.S.C. § 1291 to the Ninth Circuit] arguing as he did below that . . . his convictions should be reversed because prior to his making of the written statements he was not adequately informed of his right to consult with and have a lawyer, retained or appointed, present *prior* to questioning. . . .

Before making the incriminating statements, Snaer executed and had read to him Guam's custodial interrogation warning form which reads as follows:

> Before we ask you any questions, you must understand your rights.
>
> You have the right to remain silent. You do not have to talk to me unless you want to do so.
>
> If you do want to talk to me, I must advice [sic] you that whatever you say can and will be used as evidence against you in court.
>
> You have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned.
>
> If you want a lawyer but are unable to pay for one, a lawyer will be appointed to represent you free of any cost to you.
>
> Knowing these rights, do you want to talk to me without having a lawyer present? You may stop talking to me at any time and you may also demand a lawyer at any time.

(*Guam v. Snaer*, 758 F.2d 1341 (9th Cir. 1985) (2-1 decision).)

The Ninth Circuit affirmed:

> This court has made clear that a suspect must be informed that he has the right to have counsel present during questioning. *United States v. Noti*, 731 F.2d 610, 614-15 (9th Cir. 1984). The Guam form indisputably meets that requirement in its pararaphs four and six. Snaer contends, however, that he must also be informed that he has the right to consult with an attorney *before* questioning, and that the Guam form failed to notify him of that right.
>
> There are no cases that satisfactorily address or resolve this issue. The Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), although making clear that one does have the right to consult with counsel before questioning, *see id.* at 470, is ambiguous as to how explicitly the person must be *warned* of that right. *See, e.g.*, 384 U.S. at 471 ("an individual . . . must be clearly informed that he had the right to consult with a lawyer and to have the lawyer with him during interrogation"); *id.* at 479 ("He must be warned . . . that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.").
>
> The Ninth Circuit, when it addressed in *Noti* the very different requirement that one be warned of his right to counsel *during* questioning, implicitly assumed and suggested that one must also be warned of his right to consult with an attorney *before* questioning. *Noti*, 731 F.2d at 614-15. Similarly, in *Smith v. Rhay*, 419 F.2d 160 (9th Cir. 1969), this court declared that, "[a]lthough Smith was told that he had the right to an attorney, he was not . . . told, as required by *Miranda*, . . . that . . . a lawyer could . . . represent him *prior to any questioning*." 419 F.2d at 163 & n.1 (emphasis added by the court). However, in neither of the above cases is there any indication as to how explicit the warning must be.

Indeed, "*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." *California v. Prysock*, 453 U.S. 355, 359 (1981) (per curiam). "If a defendant has been told the substance of his constitutional rights, it is not fatal if irrelevant words or words with no independent substance are omitted." *Noti*, 731 F.2d at 614-15. In sum, although it appears that our court requires that police make known to the suspect his right to consult with counsel prior to questioning, this court must decide as a matter of first impression just how specific and clear the warning must be.

Unlike the warnings given in many cases, the Guam form does not expressly state that one has the right to consult with a lawyer "*before* questioning" or "*prior* to questioning." However, paragraph four does state that "[y]ou have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned." We believe that the first part of that sentence read in the context of the latter half of the sentence does adequately convey notice of the right to consult with an attorney before questioning.

The right to consult with an attorney *before* questioning is significant because counsel can advise the client whether to exercise his right to remain completely silent, or, if he chooses to speak, which questions to answer or how to answer them. Thus, it is extremely important that a defendant be adequatley warned of this right. *Cf. Noti*, 731 F.2d at 615 (considering the value of the right to counsel *during* questioning). While we conclude that Guam's custodial interrogation warning form meets the minimum requirements of the Constitution, it would not be amiss for Guam to revise its form to more clearly warn of the right to consult with counsel before questioning. Such a revision would, in accordance with the objectives of *Miranda*, help insure that all persons making statements are fully aware of their rights.

. . . .

AFFIRMED.

(*Id.* ____ (footnotes omitted).)

Circuit Judge William A. Norris dissented:

> As Justice O'Connor recently stated, "The standard *Miranda* warnings explicitly inform the suspect of his right to consult a lawyer before speaking." *Oregon v. Elstad*, ____ U.S. ____, 105 S.Ct. 1285, 1297 (1985). The majority here admits that the right to consult with an attorney *before* questioning is significant, but it holds that the defendant here was properly informed of his *Miranda* rights, although not explicitly.
>
> We have observed that it is a simple matter for the police to avoid allegations of error in *Miranda* warnings by reading the defendant his rights from a prepared form. *United States v. Noti*, 731 F.2d 610, 614-15 (9th Cir. 1984). "Although we do not require such a reading, we encourage it." *Id.* at 615. Since we encourage the use of prepared forms, I think we must scrutinize the language in such forms more closely than we would an extemporaneous warning. The majority has found that Guam's standard *Miranda* warning, although not explicit, satisfies our minimum requirements. I am afraid that such a rule may provide a disincentive for doing what the majority commendably tries to encourge Guam to do—that is, revise its custodial interrogation warning form to "explicitly inform the suspect of his right to consult a lawyer before speaking." *Elstad*, ____ U.S. at ____, 105 S.Ct. at 1297.

(*Id.* ____.)

REASON FOR ALLOWING WRIT

The Ninth Circuit says, "The right to consult with an attorney *before* questioning is significant because counsel can advise the client whether to exercise his right to remain completely silent, or, if he chooses to speak, which questions to answer or how to answer them." (*Id.* ____.) According to the dissent, "The majority here admits that the right to consult with an attorney *before* questioning is significant, but it holds that the defendant here was properly informed of his *Miranda* rights, although *not explicitly*." (*Id.* ____ (second emphasis added).) This Court says, "The

standard *Miranda* warnings *explicitly* inform the suspect of his right to consult a lawyer *before* speaking." (*Oregon v. Elstad,* 105 S.Ct. 1285, 1297 (1985) (emphasis added).) But this Court's pronouncement that the standard Miranda warnings *explicitly* inform a suspect of his right to consult a lawyer *before* speaking is on a point other than the precise issue involved in *Elstad.* Hence the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court: "In sum, although it appears that our court requires that police make known to the suspect his right to consult with counsel *prior* to questioning, this court must decide *as a matter of first impression* just how specific and clear the warning must be." (*Guam v. Snaer,* 758 F.2d 1341, ____ (9th Cir. 1985) (emphasis added).)

CONCLUSION

For the foregoing resons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, Agana, Guam,

June 21, 1985.

Respectfully submitted,

HOWARD TRAPP
Attorney for Petitioner

[Appendices follow]

Appendix A

District Court of Guam
Territory of Guam
Appellate Division
D.C. Criminal Case 82-00060A

People of the Territory of Guam,
Plaintiff-Appellee,
v.
Samuel C. Snaer,
Defendant-Appellant.

[Filed June 22, 1984]

OPINION

BEFORE: DUENAS, LAURETA, and KEEP,
District Judge

DUENAS, District Judge:

The Defendant and his relatives were picnicking at Tanguissan Beach, Guam, on May 31, 1982. At some point they became involved in an argument and a fight with another group of people. The Defendant then left the area, went to his home, got a gun and returned to the crowed picnic and beach area and started shooting at his adversaries. The Defendant shot an innocent bystander in the leg and then fled.

Later that same day, the Defendant surrendered himself and the gun to police officers. Before being questioned about the incident, he was advised of his Constitutional rights as a criminal suspect through the use of a standardized, custodial interrogation (Miranda) warning form. This Miranda warning form stated in pertinent part as follows:

> Before we ask you any questions, you must understand your rights.
>
> You have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned.

If you want a lawyer but are unable to pay for one, a lawyer will be appointed to represent you free of any cost to you.

Knowing these rights, do you want to talk to me without having a lawyer present?

You may stop talking to me at any time and you may also demand a lawyer at any time.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are.

I am willing to make a statement and answer questions. I do not want a lawyer at this time.

Police Officer M.R. Rivo presented the Defendant with the Miranda form and read to the Defendant each paragraph of the form, asked him if he understood the paragraph and instructed him to put *yes* on the right corner of each paragraph and initial it if he understood the paragraph. The defendant then answered that he understood all the paragraphs in the form and wrote *yes* and his initials on the right side of each paragraph of the form. The police officer then read to the Defendant the waiver of rights paragraph and asked the Defendant if he would sign the waiver. The Defendant did so. After thereby acknowledging and waiving his Constitutional rights, the Defendant made an oral and a written statement.

The Defendant was then transported to the detective division of the Department of Public Safety. There, at the request of police officers, he read aloud the contents of the Miranda warning form he had just executed. On the back of the Miranda warning form, he answered five additional written questions concerning the extent of his education, his comprehension of the English language and his length of residence on Guam. The Defendant then dictated a second, more complete statement about the incident to an officer who offered to transcribe it.

On June 10, 1982, the Territorial Grand Jury indicted the Defendant for Aggravated Assault and Possession and Use of a

Deadly Weapon. The Indictment reads in pertinent part as follows:

> "On or about May 31, 1982, in the Territory of Guam, Samuel C. Snaer did recklessly cause serious bodily injury to another, that is: Pamela D. Ghahate, in circumstances manifesting extreme indifference to the value of human life, in violation of section 19.20 (a)(1) of the Criminal and Correctional Code of Guam, as amended.
>
> "On or about May 31, 1982, in the Territory of Guam, Samuel C. Snaer, while engaged in the commission of a felony as set forth in the first charge in this indictment, did unlawfully and intentionally possess and use a deadly weapon, in violation of section 80.37 of the Criminal and Correctional Code of Guam, as amended."

On September 30, 1982, the Defendant moved to suppress his written statements to the police on the grounds that he was never told of his right to consult with and have a lawyer present prior to interrogation and that no warning conveyed to him his right to have a lawyer appointed prior to interrogation. The motion was denied on October 1, 1982.

The Defendant also moved to dismiss the charge of possessing and using a deadly weapon in the commission of an aggravated assault on the grounds that 9 Guam Code Annotated, Section 80.37, an enhancement statute, may not be applied to a Defendant who uses a deadly weapon in the commission of a felony proscribed by a statute (9 Guam Code Ann., Ch. 19) which itself allegedly authorizes enhancement where a deadly weapon is used. This motion was also denied.

At the Defendant's jury trial, his confessions were admitted into evidence over timely objection. On October 6, 1982, the Defendant was found guilty of both charges.

The Defendant was sentenced on October 21, 1982. At his sentencing, the Defendant contended that the offense of use of a deadly weapon during the commission of a felony may not be applied to a Defendant who commits the offense of aggravated assault. The Defendant then received the following sentence:

> Wherefore, it is hereby ordered that for the offense of aggravated assault, the defendant, Samuel C. Snaer, is hereby sentenced to the Guam Penitentiary for a term of seven (7) years. For the offense of possession and use of a deadly weapon during the commission of a felony, the defendant is sentenced to serve a term of seven (7) years. The sentence given on the second charge is to be served consecutively.
>
> The charge of possession and use of a deadly weapon during the commission of a felony shall include three years special parole in addition to the term of imprisonment and the defendant shall not be eligible for parole or probation or any work release program for the first five years of his confinement on this charge.

The Defendant-Appellant now appeals his conviction and sentencing.

I.

The U.S. Supreme Court in *Miranda v. Arizona,* 384, U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966) requires that a criminal suspect be informed prior to any custodial interrogation that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

The Defendant-Appellant maintains that the *Miranda* warning form executed by him fails to adequately inform him of his right to consult with and have retained or appointed counsel present before submitting to any interrogation as required by *Miranda v. Arizona, Id.*

The Defendant continues by arguing that he should have been specifically advised, that "[y]ou have a right to talk to a lawyer before questioning," *Wyrick v. Fields,* 103 S.Ct. 394, 394-395 (1982); that "[y]ou have the right to consult your attorney before making any statement or answering any question," [*United States v. Contreras,* 667 F.2d 976, 978 (11th Cir., 1982); that "[y]ou have the right to talk to a lawyer for advice before we ask you any

questions" and that "[i]f you cannot afford a lawyer, one will be appointed for you, if you wish, before any questioning begins". [Waiver of Rights, United States Marshal's Service, U.S. Department of Justice USM-309 (Est. 10/6/80)]. We do not agree that only the language quoted by the Defendant adequately conveys to a Defendant that he has a right to the presence of a chosen or appointed attorney prior to and during interrogation.

It is true that a Miranda warning is deemed defective if it fails to inform a suspect of his right to the presence of a chosen or appointed attorney, or indicates that it associates the offer of an appointed attorney with a future time in court; however, we do not believe that the Miranda warning in question fails to so inform the Defendant-Appellant or associates the offer of an appointed attorney with a future time in court. *California v. Prysock,* 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed. 2d 696 (1981).

It is the opinion of this Court that the Miranda form in question adequately conveys to a Defendant his rights as set forth in *Miranda, supra.*

The Defendant-Appellant was charged with and convicted of the offense of aggravated assault pursuant to 9 G.C.A. § 19.20(a)(1). Section 19.20 reads in its entirety as follows:

> *"Aggravated Assault, Defined & Punished.*
>
> (a) A person is guilty of aggravated assault if he either recklessly causes or attempts to cause:
>
> (1) serious bodily injury to another in circumstances manifesting extreme indifference to the value of human life;
>
> (2) serious bodily injury to another; or
>
> (3) bodily injury to another with a deadly weapon.
>
> (b) Aggravated assault under Paragraph (1) of Subsection (a) is a felony of the second degree; aggravated assault under Paragraphs (2) or (3) of Subsection (a) is a felony of the third degree."

The Defendant was sentenced to a seven-year term of imprisonment for the offenses of aggravated assault and his sentence

was enhanced by a consecutive seven-year term for the use of a deadly weapon in violation of 9 G.C.A., Section 80.37.

Section 80.37 reads as follows:

> *"Deadly Weapons Used in Felonies; Sentence.*
>
> Whoever unlawfully possesses or uses a deadly weapon in the commission of a felony punishable under the laws of Guam shall, in addition to the punishment imposed for the commission of such felony, be imprisoned for a term of not less than five (5) years nor more than twenty-five (25) years. The sentence shall include a special parole term of not less than three (3) years in addition to such term of imprisonment. No person convicted and sentenced hereunder shall be eligible for parole or probation until he shall have served at least five (5) years in prison. No person convicted or sentenced hereunder shall be eligible to participate in any work release program until he shall have served at least five (5) years. The term required to be imposed by this Section shall not run concurrently with any term of imprisonment imposed for the commission of any other felony."

The Defendant-Appellant argues that enhanced sentencing under Section 80-37 is not permissible where the assault-type crime statute (§ 19.20) contains its own enhancement provisions. We do not agree with the Defendant-Appellant's argument for numerous reasons.

First, the Defendant was charged by indictment and convicted under Section 19.20(a)(1) which reads as follows:

> *"Aggravated Assault; Defined & Punished.*
>
> (a) A person is guilty of aggravated assault if he either recklessly causes or attempts to cause:
>
> (1) serious bodily injury to another in circumstances manifesting extreme indifference to the value of human life."

Aggravated Assault under Section 19.20(a)(1) lacking nexus with a deadly weapon is punishable as a felony of the second degree; whereas, aggravated assault with a deadly weapon under Section 19.20(a)(3) is punishable as a felony of the third degree.

If there is any self-contained enhancement provision in Section 19.20, as contended by Defendant-Appellant, it obviously does not arise because of the existence of a deadly weapon as an essential element of aggravated assault. Such contention lacks merit.

Second, the offense of aggravated assault and the offense of possession or use of a deadly weapon in the commission of a felony are factually distinct offenses under the test set forth in *Blockburger v. United States,*[1] 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and the Defendant-Appellant's sentencing under both is not impermissible under the Double Jeopardy Clause. It is true that Section 19.20(a)(3) specifically sets forth the offense of aggravated assault as "bodily injury to another with a deadly weapon", but, as noted above, an aggravated assault under Section 19.20 can be established without proving the use of a deadly weapon and this is the theory the government proceeded under as evidenced by the indictment filed against the Defendant, as well as the jury instructions given at trial. The offense of possession or use of a deadly weapon in the commission of a felony on the other hand requires proof of the possession or use of a deadly weapon, a fact which is not an essential element of the offense of aggravated assault under Section 19.20(a)(1).

Third, this Court finds no express legislative intent that Section 19.20 is an enhancement statute. In fact, as the Government has pointed out, the most serious aggravated assault offense [§ 19.20(a)(1)] is defined without regard to the possession of a deadly weapon and the misdemeanor assault with a deadly weapon (§ 19.30)[2] carries the same maximum penalties as other types of assault.

---

[1] Where the same act constitutes a violation of two distinct statutory provisions, the test set forth in *Blockburger v. United States, supra* at 304, "to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

[2] Section 19.30 of Guam Code Annotated reads as follows:

"*Assault; Defined & Punished.*

(a) A person is guilty of assault if he:

Finally, even if Section 19.20 and Section 80.37 were found to proscribe the same conduct, it is the opinion of this Court that the Guam Legislature intended that cumulative sentences could be imposed in a single trial under those sections and thus not be violative of the Double Jeopardy Clause.

In *Missouri v. Hunter*, ____ U.S. ____ , 103 S.Ct. 673, 679 (1983), the Supreme Court held that even if the offense of first degree robbery and armed criminal action were construed to prohibit the same conduct, the Double Jeopardy Clause did not preclude the imposition of cumulative punishment in a single trial, where the legislature has expressly intended for cumulative sentencing.

It is clear to this Court that the Guam Legislature has so intended to impose cumulative sentences for the use of deadly weapons during the commission of a felony as evidenced by Section 80.37 which states in pertinent part:

> "Whoever unlawfully possesses or uses a deadly weapon in the commission of a felony punishable under the laws of Guam shall, in addition to the punishment imposed for the commission of such felony, be imprisoned for a term of not less than five (5) years nor more than twenty-five (25) years. . . . The term required to be imposed by this Section shall not run concurrently with any term of imprisonment imposed for the commission of any other felony."

The Ninth Circuit in its recent decision in *People v. Borja* (9th Cir. Slip Opinion No. 83-1138 at p.6, filed on May 4, 1984) recognizes that "Section 80.37 is an unambiguous expression of the Guam legislature's intent to impose additional punishment on

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(1) either recklessly causes or attempts to cause bodily injury to another;

(2) recklessly uses a deadly weapon in such a manner as to place another in danger of bodily injury; or

(3) by physical menace intentionally puts or attempts to put another in fear of imminent bodily injury.

(b) Assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

those who use weapons during the commission of felonies". The Ninth Circuit continued by stating that such "legislative intent should be honored".

This is exactly what this Court intends to do. Thus, we find no violation of the Double Jeopardy Clause for the punishment imposed on the Defendant-Appellant in this trial since it was no greater than the Guam Legislature intended. *Hunter, supra,* 103 S.Ct. at 679.

The Defendant-Appellant's conviction is affirmed.[3]

CRISTOBAL C. DUENAS
Cristobal C. Duenas, District Judge

ALFRED LAURETA
Alfred Laureta, District Judge

JUDITH N. KEEP
Judith N. Keep, District Judge

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[3] On May 31, 1984, subsequent to oral argument in the above-entitled case, the Appellant submitted the Ninth Circuit case entitled *United States v. Noti,* No. 83-5064 (9th Cir., April 17, 1984) for the consideration of the Appellate panel. The panel has carefully reviewed said case and is of the opinion that it will not change the holding of this Court in the instant matter.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 84-1198

D.C. No. 82-00060A

People of the Territory of Guam,
Plaintiff-Appellee,

Samuel C. Snaer,
Defendant-Appellant.

OPINION

Argued and Submitted December 14, 1984

Filed April 25, 1985

Appeal from the Appellate Division
of the District Court of Guam
Cristobal C. Duenas, Alfred Laureta and Judith Nelson Keep,
District Judges, Presiding

SUMMARY

A warning that informs a suspect that he has the right to consult with a lawyer adequately informs him of his right to consult with a lawyer prior to questioning. Punishment for recklessly causing serious bodily injury may be enhanced for use of a deadly weapon.

Defendant was read a warning from a form that included the statement "You have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned." His subsequent incriminating statements were admitted at trial over his objection. Defendant was convicted in Guam of aggravated assault and use of a deadly weapon during a felony.

[1] The Court of Appeals noted that one has the right to consult with counsel before questioning and has the right to be informed of that right. [2] The warning form meets the minimum constitutional requirements.

Although Guam's aggravated assault law includes bodily injury caused with a deadly weapon, defendant was convicted of causing serious bodily injury with indifference to life. [3] Where the same act violates two statutory provisions, there are two offenses if each provision requires proof of a fact which the other does not. Cumulative punishments for the same offense must be clearly intended by the legislature. Guam has clearly indicated its desire to impose cumulative sanctions on those who use deadly weapons in the commission of felonies. Use of a deadly weapon is not an element of the form of aggravated assault for which defendant was convicted. [4] That a different form of aggravated assault does include use of a deadly weapon does not prevent Guam from increasing penalties for use of a deadly weapon for persons who cause serious bodly injury.

The dissent expressed concern that the majority's approval of Guam's form may serve as a disincentive to the revision of the form to include an explicit warning.

Affirmed.

COUNSEL

Trapp & Untalan and Howard G. Trapp, Agana, Guam, for the defendant-appellant.

Richard Opper and Thomas Lannen, Agana, Guam, for the plaintiff-appellee.

OPINION

Before: CHOY, Senior Circuit Judge, CANBY and NORRIS, Circuit Judges.

CHOY, Senior Circuit Judge:

Defendant, Samuel C. Snaer, was convicted in the Superior Court of Guam of aggravated assault and possession and use of a deadly weapon during the commission of a felony. He was sentenced to seven years in the Guam Penitentiary for the aggravated assault charge, and to another seven years to be served

consecutively for the deadly weapon conviction, with an additional three year special parole requirement and ineligibility for parole, probation, or work release for the first five years on the latter charge.

Prior to trial, Snaer unsuccessfully sought to suppress written statements he had made to police and to dismiss the deadly weapon charge. At trial, Snaer's statements were admitted into evidence over timely objection. Snaer's convictions were affirmed by the Appellate Division of the District Court of Guam. Snaer now appeals to this court arguing as he did below that 1) his convictions should be reversed because prior to his making of the written statements he was not adequately informed of his right to consult with and have a lawyer, retained or appointed, present *prior* to questioning, and that 2) the deadly weapon charge could not properly be tacked on to the offense of aggravated assault because the latter offense itself involves enhancement of punishment where a deadly weapon is used.

Before making the incriminating statements, Snaer executed and had read to him Guam's custodial interrogation warning form which reads as follows:

> Before we ask you any questions, you must understand your rights.
>
> You have the right to remain silent. You do not have to talk to me unless you want to do so.
>
> If you do want to talk to me, I must advice(sic) you that whatever you say can and will be used as evidence against you in court.
>
> You have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned.
>
> If you want a lawyer but are unable to pay for one, a lawyer will be appointed to represent you free of any cost to you.
>
> Knowing these rights, do you want to talk to me without having a lawyer present? You may stop talking to me at any time and you may also demand a lawyer at any time.

I. *Adequacy of the* Miranda *Warning*

This court has made clear that a suspect must be informed that he has the right to have counsel present *during* questioning. *United States v. Noti,* 731 F.2d 610, 614-15 (9th Cir. 1984). The Guam form indisputably meets that requirement in its paragraphs four and six. Snaer contends, however, that he must also be informed that he has the right to consult with an attorney *before* questioning, and that the Guam form failed to notify him of that right.

[1] There are no cases that satisfactorily address or resolve this issue. The Supreme Court in *Miranda v. Arizona,* 384 U.S. 436 (1966), although making clear that one does have the right to consult with counsel before questioning, *see id.* at 470, is ambiguous as to how explicitly the person must be *warned* of that right. *See, e.g.,* 384 U.S. at 471 ("an individual . . . must be clearly informed that he had the right to consult with a lawyer and to have the lawyer with him during interrogation"); *id.* at 479 ("He must be warned . . . that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.").

The Ninth Circuit, when it addressed in *Noti* the very different requirement that one be warned of his right to counsel *during* questioning, implicitly assumed and suggested that one must also be warned of his right to consult with an attorney *before* questioning. *Noti,* 731 F.2d at 614-15. Similarly, in *Smith v. Rhay,* 419 F.2d 160 (9th Cir. 1969), this court declared that "[a]lthough Smith was told that he had the right to an attorney, he was not . . . told, as required by *Miranda,* . . . that . . . a lawyer could . . . represent him *prior to any questioning.*" 419 F.2d at 163 & n.1 (emphasis added by the court). However, in neither of the above cases is there any indication as to how explicit the warning must be.

Indeed, "*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." *California v. Prysock,* 435 U.S. 355, 359 (1981) (per curiam). "If a defendant has been told the substance of his constitutional rights, it is not fatal if irrelevant words or words with no independent substance are omitted." *Noti,* 731 F.2d at 614-15. In sum, although it appears that our court requires that police make known to the suspect his

right to consult with counsel prior to questioning, this court must decide as a matter of first impression just how specific and clear the warning must be.

[2] Unlike the warnings given in many cases, the Guam form does not expressly state that one has the right to consult with a lawyer "*before* questioning" or "*prior* to questioning." However, paragraph four does state that "[y]ou have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned." We believe that the first part of that sentence read in the context of the latter half of the sentence does adequately convey notice of the right to consult with an attorney before questioning.[1]

The right to consult with an attorney *before* questioning is significant because counsel can advise the client whether to exercise his right to remain completely silent, or, if he chooses to speak, which questions to answer or how to answer them. Thus, it is extremely important that a defendant be adequately warned of this right. *Cf. Noti,* 731 F.2d at 615 (considering the value of the right to counsel *during* questioning). While we conclude that Guam's custodial interrogation warning form meets the minimum requirements of the Constitution, it would not be amiss for Guam to revise its form to more clearly warn of the right to consult with counsel before questioning.[2] Such a revision would, in accordance with the objectives of *Miranda,* help insure that all persons making statements are fully aware of their rights.

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[1] The form states, in paragraph six, that "you may also demand a lawyer at any time." While this clause might suggest a right to consult with an attorney *before* questioning, it could also be reasonably interpreted in the context of paragraph four and the rest of paragraph six to refer only to the right to have a lawyer present *during* questioning. *Cf. Atwell v. United States,* 398 F.2d 507, 510 (5th Cir. 1968) (a warning that one can consult with an attorney at "anytime" is ambiguous).

[2] For example, the mere addition of the words "before questioning" after the words "consult with a lawyer" in paragraph four would suffice.

II. *Propriety of Tacking on the Deadly Weapon Charge*

Snaer was indicted for and convicted of violating subsection (a)(1) of Guam's aggravated assault law, 9 Guam Code Ann. § 19.20, which reads:

> (a) A person is guilty of aggravated assault if he either recklessly causes or attempts to cause:
>
> (1) serious bodily injury to another in circumstances manifesting extreme indifference to the value of human life;
>
> (2) serious bodily injury to another; or
>
> (3) bodily injury to another with a deadly weapon.
>
> (b) Aggravated assault under Paragraph (1) of Subsection (a) is a felony of the second degree; aggravated assualt(sic) under Paragraphs (2) or (3) or(sic) Subsection (a) is a felony of the third degree.

Snaer was also convicted of violating 9 Guam Code Ann. § 80.37 which imposes an additional punishment on those who use a deadly weapon in the commission of a felony. It reads:

> Whoever unlawfully possesses or uses a deadly weapon in the commission of a felony . . . shall, in addition to the punishment imposed for the commission of such felony, be imprisoned for a term of not less than five (5) years nor more than twenty-five (25) years. . . . The term required to be imposed by this Section shall not run concurrently with any term of imprisonment imposed for the commisssion of any other felony.

Snaer contends that because Guam's aggravated assault law already "enhances" the penalty where a deadly weapon is used, *see* § 19.20(a)(3), it is improper to apply the separate § 80.37 deadly weapon provision to further increase the penalty.

[3] Under *Blockburger v. United States,* 284 U.S. 299 (1932), the rule is that where the same act violates two statutory provisions, the test to determine whether there are two offenses or only one is "whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. Contrary to the Appellate

Division's holding, the statutes *fail* the *Blockburger* test because to prove a violation of § 80.37 requires proof of an underlying felony, which in this case is the § 19.20(a)(1) offense. That is, § 19.20(a)(1) is, for the purposes of this particular case, a lesser included offense of § 80.37. It is true that other felonies can also bring one under § 80.37, but that does not change the above conclusion. *See Whalen v. United States,* 445 U.S. 684, 694 (1980).

Most importantly, however, the *Blockburger* test is merely a rule of statutory construction, *see Whalen,* 445 U.S. at 691, which holds that "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments *in the absence of a clear indication of contrary legislative intent." Whalen,* 445 U.S. at 692 (emphasis added). With respect to cumulative sentences imposed in a single trial, "the Double Jeopardy Clause does not more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter,* 459 U.S. 359, 366 (1983); *see also Albernaz v. United States,* 450 U.S. 333, 340 (1981).

Guam has clearly indicated its desire to impose cumulative sanctions on those who use deadly weapons in the commission of felonies. Indeed, Guam's purpose in enacting § 80.37 was specifically to impose a penalty that would be in addition to the punishment for the underlying felony. *See People of Territory of Guam v. Borja,* 732 F.2d 733, 736 (9th Cir.) *cert. denied,* 105 S. Ct. 300 (1948). Thus, the *Blockburger* test is not at all helpful nor determinative in this context.

[4] Snaer argues, however, that Guam could not have intended to impose the additional punishment when the underlying felony is *aggravated assault,* a felony which already includes a "deadly weapons" element. This contention is without merit. Snaer's aggravated assault conviction was *not* based on § 19.20(a)(3), the deadly weapon version of aggravated assault, but rather on § 19.20(a)(1), which condemns the reckless causing of *serious* bodily injury in circumstances manifesting extreme indifference to human life. Use of a deadly weapon is simply not an element of a § 19.20(a)(1) offense. Nothing suggests that because Guam chose to impose a harsher felony punishment upon those who

inflict *serious* bodily injury, it would not wish to increase the penalty even further when that person uses a *deadly weapon.*

AFFIRMED.

NORRIS, Circuit Judge, dissenting:

As Justice O'Connor recently stated, "The standard *Miranda* warnings explicitly inform the suspect of his right to consult a lawyer before speaking." *Oregon v. Elstad,* ____U.S. ____, 105 S. Ct. 1285, 1297 (1985). The majority here admits that the right to consult with an attorney *before* questioning is significant, but it holds that the defendant here was properly informed of his *Miranda* rights, although not explicitly.

We have observed that it is a simple matter for the police to avoid allegations of error in *Miranda* warnings by reading the defendant his right from a prepared form. *United States v. Noti,* 731 F.2d 610, 614-15 (9th Cir. 1984). "Although we do not require such a reading, we encourage it." *Id.* at 615. Since we encourage the use of prepared forms, I think we must scrutinize the language in such forms more closely than we would an extemporaneous warning. The majority has found that Guam's standard *Miranda* warning, although not explicit, satisfies, our minimum requirements. I am afraid that such a rule may provide a disincentive for doing what the majority commendably tries to encourage Guam to do—that is, revise its custodial interrogation warning form to "explicitly inform the suspect of his right to consult a lawyer before speaking." *Elstad,* ____ U.S. at ____, 105 S. Ct. at 1297.